

A "retailer maintaining a place of business in Illinois" as described in 86 Ill. Adm. Code 150.201(i) is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL).

March 17, 2000

Dear Xxxxx:

This letter is in response to your letter dated March 6, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

This office has clients who are very interested in the laws, rules and regulations of your state governing sales or use taxes which should be collected on merchandise which is shipped into your state by an out-of-state catalogue merchant.

Firstly, I am wondering if you have any pamphlets, brochures or other informational literature covering this topic which you could send to my office. If so, I would greatly appreciate the earliest possible receipt of these documents.

Secondly, I have a number of specific questions which I would appreciate having you answer for me, unless they are clearly and unambiguously covered in any explanatory literature which you are sending to me. As an aid to your answering these questions, I am enclosing a separate sheet on which the answers can be noted. I would appreciate it if you would enclose this sheet, with the answers duly filled in, along with whatever literature you will be sending me. If you have no literature to send, I would appreciate it if you would simply fill out the answers on the separate sheet and return it.

FIRST: What is your state sales tax rate?

SECOND: To what items or categories of items does it apply? Is there a specific statute that defines what is taxable? If so, what is the number of the statute?

THIRD: Does your state have a 'use tax' or similar tax which is imposed not on the sale of goods which occurs within the states, but which applies to goods sold and shipped to a customer in your state by an out-of-state merchant who does not have a business presence in your state? If you do have such a tax, what is it?

- FOURTH: If you do have a 'use tax', to what items or types of items does it apply? Is there a specific statute that defines what is subject to the use tax? If so, what is the number of the statute?
- FIFTH: Do you require out-of-state merchants, who do not have a business presence in your state, to collect your use tax on orders shipped into your state?
- SIXTH: Does your state require that, when an out-of-state merchant is computing the amount of use tax to charge on shipments of merchandise into your state, the merchant include shipping and handling in the total amount upon which the tax is imposed? [For example, if a catalog merchant based in Idaho were to ship clothing to a customer domiciled in your state and the merchandise alone cost \$85.00 and the shipping and handling totaled \$15.00, should the Idaho merchant charge tax on \$85.00 only – the cost of the merchandise, or on \$100.00, the total cost of merchandise plus shipping and handling?]
- SEVENTH: If you require a merchant to collect the use tax on the total of the merchandise plus shipping and handling, does whether or not the tax is imposed on the total (as opposed to the merchandise component only) depend at all on: a) How the merchandise is shipped; b) When the merchandise is paid for (e.g. payment in advance vs. c.o.d.); c) When 'title passes' to the merchandise or any other such concept (usually derived from the Uniform Commercial Code); or d) Any other factor?
- EIGHTH: What mechanisms do you have in place for an out-of-state merchant to remit collected sales or use taxes to your agency? Do you have any brochures and/or forms to assist merchants in setting up such accounts (if so, please send copies of them along with these answers)? Do you have a standardized return which a merchant should file along with collected use tax receipts (again, if so, please send copies of them)?
- NINTH: Do you send out bulletins or other mailings to out of state merchants and others (such as attorneys) who have use tax accounts in your state, which announce changes in your state's use tax laws? If so, I would appreciate it if you would immediately put me on the mailing list for all such mailings. If there is anything else I need to do in order to have my firm name placed on your mailing list, please advise me, and, if there are any forms to fill out, please send them.
- TENTH: Could you please provide the direct line to the legal department or attorney assigned to your agency, who would be the most familiar with complicated questions relating to sales and use taxes within your state? I anticipate needing to call and ask questions from time to time.

Thank you so very much for your assistance in answering these many questions.

We are unable to answer your questions in the format you requested. The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 (1998 State Bar Edition). The State sales tax rate is 6.25% plus local taxes. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (1998 State Bar Edition). The State Use Tax rate is 6.25%. These taxes together are commonly referred to as the sales tax.

The Retailers' Occupation Tax and the Use Tax Act have several exemptions from taxation. The majority of the exemptions can be found at 35 ILCS 120/2-5 for the Retailers' Occupation Tax and 35 ILCS 105/3-5 for the Use Tax. Please note that this list is not exclusive and additional exemptions can be found throughout the Act. Both the statutes and the Department's regulations can be found on the Department's website at www.revenue.state.il.us.

The following information outlines the principles of nexus. An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

As a technical proposition, handling charges represent a retailer's cost of doing business, and are consequently always included in gross charges subject to tax. See 86 Ill. Adm. Code 130.410. However, such charges are often stated in combination with shipping charges. In this case, charges designated as "shipping and handling," as well as delivery or transportation charges in general, are not taxable if it can be shown that they are both separately contracted for and that such charges are actually reflective of the costs of shipping. To the extent that shipping and handling charges exceed the costs of shipping, the charges are subject to tax. As indicated above, charges termed "delivery" or "transportation" charges follow the same principle.

The best evidence that shipping and handling or delivery charges have been contracted for separately by purchasers and retailers are separate contracts for shipping and handling or delivery. However, documentation that demonstrates that purchasers had the option of taking delivery of the property, at the sellers' location for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice. If retailers charge customers shipping and handling or delivery charges that exceed the retailers' cost of providing the transportation or delivery, the excess amount is subject to tax.

Mail order delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the mail order form requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. See subsection (d) of Section 130.415. If the retailer charges a customer shipping and handling or delivery charges that exceed the retailer's cost of providing the transportation or delivery, the excess amount is subject to tax.

We have included an Illinois Business Packet that includes an NUC-1 form. This form is used by businesses to register with Illinois for sales tax purposes. A copy of the ST-1, Sales and Use Tax Return can be accessed from the Department's website. The Department sends out bulletins to taxpayers affected by changes in the law. These bulletins and the Department's publications can be accessed from the Department's website.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

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Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.